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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EZEOMA CHIGOZIE OBIOHA, Defendant and Appellant.	B283583 (Los Angeles County Super. Ct. No. BA450030)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Law Offices of Meghan A. Blanco and Meghan A. Blanco for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Carrie Melvin was walking near Sunset Boulevard with her boyfriend on the night of July 5, 2015 when she was fatally shot in the face by an assailant with a shotgun. The next morning, two children found a shotgun registered to defendant Ezeoma Obioha lying on tidal rocks at a beach at the terminus of Sunset Boulevard. A live round of the unusual ammunition used in the Melvin slaying was found near the gun. Further investigation revealed that Melvin recently had done some consulting work for defendant, filed a claim for unpaid wages against him with the state Labor Commission, and rebuffed his romantic advances. Two eyewitnesses to the murder selected defendant's photo from a six-pack photo lineup and identified him in court. On this and additional evidence, a jury found defendant guilty of first degree murder and found true a special circumstance allegation that the crime was committed for financial gain.

In this appeal, defendant challenges his conviction on numerous grounds. He contends the six-pack photo lineup was impermissibly suggestive; the prosecutor ambushed him with previously undisclosed expert testimony at trial; the court erred in excluding his evidence of third party culpability and destruction of evidence; the court erred in admitting the gun, paperwork related to the gun, and recorded phone calls between him and his sister; the prosecutor impermissibly relied on hearsay evidence to prove the special circumstance allegation; his trial counsel rendered ineffective assistance; the prosecutor committed *Griffin*[1] error by commenting on his refusal to provide his cellphone passcode; his speedy trial rights were violated; and the cumulative effect of multiple errors undermined confidence in the verdict. He also requests that we review sealed *Pitchess*[2]

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[1]*Griffin v. California* (1965) 380 U.S. 609.
[2]*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

hearing transcripts. The Attorney General does not object to the *Pitchess* request, but contends the remainder of defendant's arguments do not warrant reversal. We agree and affirm.

PROCEDURAL HISTORY

An information filed in October 2016 charged defendant with the first degree murder of Melvin (Pen. Code, § 187). The information further alleged the special circumstance that the murder was intentional and carried out for financial gain (Pen. Code, § 190.2, subd. (a)(1)). It also alleged that defendant personally used and intentionally discharged a firearm, causing great bodily injury and death to Melvin (Pen. Code, § 12022.53, subds. (b), (c), (d)).

Defendant pled not guilty and denied the allegations. Jury trial began on November 29, 2016. On December 13, 2016, the jury found defendant guilty of first degree murder and found true the special circumstance allegation. It also found true the firearm enhancement allegation (Pen. Code, § 12022.53, subd. (d)).

Defendant retained new counsel after trial and moved for new trial on many of the same grounds underlying the instant appeal. The trial court denied the motion.

On June 5, 2017, the trial court sentenced defendant to life without the possibility of parole on the special circumstance murder. It imposed an additional term of 25 years to life for the firearm enhancement.

Defendant timely appealed.

FACTUAL BACKGROUND

I. Prosecution Evidence

A. The Shooting

Anyi-Malik Howell testified that he and his girlfriend, Carrie Melvin, left their Los Angeles apartment to get a late dinner around 10:00 p.m. on July 5, 2015. As they neared the intersection of McCadden Place and Sunset Boulevard, Howell

heard footsteps behind him. He turned around and saw a man wearing a dark jacket and cap holding a shotgun near his chin and chest. The man pointed the shotgun at him. Howell had never seen the man before. He identified the man in court as defendant.

Melvin continued walking for a few steps, then turned around. Defendant "shifted the focus of his shotgun towards her." Howell kept his eyes on defendant and asked him not to do anything. Defendant then fired a single round at Melvin. Melvin fell to the ground.

Expecting defendant to reload the gun and shoot him next, Howell jumped down near the curb. He did not hear defendant reload the gun, so he looked up and looked defendant in the eyes. Howell then got up and sought cover behind a pillar. From his vantage point behind the pillar, he got a good look at defendant's face as defendant slowly walked backward away from the scene.

Once he lost sight of defendant, Howell emerged from behind the pillar, saw Melvin face down "in a puddle of blood," and "kind of lost it." He screamed and shouted for help and called 911. The prosecutor played a recording of the 911 call for the jury.

Howell was not the only witness to the shooting. Eric Munguia, a security guard who worked at a nearby building, was driving to his post around 10:00 p.m. on July 5, 2015. As he approached and stopped at a stop sign, Munguia saw Melvin and her boyfriend walking; he knew Melvin because she used to rent a parking space in his building. Munguia saw a man cross McCadden toward them, at a jog that slowed to a walk or trot as he neared them. Munguia saw the barrel of a shotgun sticking out from the bottom of the man's black sweatshirt.

Munguia saw Howell and then Melvin turn to face the man, whom Munguia described as African-American, with a thin build

and a height of around 5'11" or 6'0". At trial, Munguia identified the man as defendant. Defendant pointed the barrel of the gun toward Melvin and Howell; he held the gun at his shoulder. Howell "immediately reacted and crouched down," and defendant shot Melvin in the head, from a distance of about six or eight feet. Munguia saw Howell get up from his crouched position and move between the building and a pillar. Munguia saw Howell and defendant look at one another. Defendant turned and looked at Munguia, who then "floored" his car and drove around the block. Munguia saw defendant head north on McCadden.

Munguia stopped his car and got the attention of someone walking down the street. While doing so, he blocked two other cars. The male passenger in one of the cars—defendant—looked at Munguia. He was African-American and was wearing a black or charcoal-colored sweatshirt with a white T-shirt underneath.

Jose Bautista testified that he was out walking his dogs near Sunset and McCadden around 10:00 p.m. on July 5, 2015 when he heard a "big bang" like a firecracker. He looked across the street and saw "a light-skinned guy running around screaming." He thought the man had dropped a bag on the ground, but when he crossed the street he realized that the bag was Melvin's body. Bautista talked to a police officer who arrived on the scene. That police officer, Juilce Rodriguez, testified that Bautista told him that he heard a loud bang, heard a man yelling for help, and saw a different man in a dark hoodie running northbound on McCadden.

Matthew Shulman, who lived in the same building as Melvin and Howell, heard a single loud boom or bang while inside his apartment on the evening of July 5, 2015. He looked out his third-floor window and saw a medium-build African-American man running northbound on McCadden. The man was about 5'11," or a few inches taller. He was wearing baggy clothes,

maybe with a hood. Shulman heard "screams that sounded like they were coming from a man." He saw a pool of blood at the corner of McCadden and Sunset, near a building with pillars.

Mark Morris testified that he was walking along Sunset with his husband around 10:00 p.m. on July 5, 2015. They were around 500 feet away from the corner of Sunset and McCadden when Morris heard a gunshot and a scream. At approximately the same time, he felt what he thought was a bullet brush across his foot.

B. The Immediate Aftermath

After the shooting, Howell spoke with a police officer who responded to the scene. The officer asked Howell if there was anyone who might have a motive to shoot Melvin. Howell gave the officer two first names: Chaka, a "former flame" of Melvin's who had harassed her in the past, and Eze, a man who had not paid Melvin for some work she had recently done for him. Howell had never seen or met Eze and did not know his full name; on cross-examination, he admitted that he had written a blog post stating that "something had to be done" about Eze, whom Howell believed had a romantic interest in Melvin. He told the officer that he had put Melvin in touch with a labor attorney so she could pursue relief against Eze. Los Angeles Police Department (LAPD) officer Andrew Moody testified that he spoke to Howell at the crime scene. Howell told him that Melvin had been involved in a legal matter with a man named Eze whom he had never met.

Howell testified that an officer took him to the police station, where he waited until 4:00 or 5:00 a.m. to speak to a detective. Howell told the detective that the shooter was between 5'10" and 6'2" tall and weighed about 200 pounds. He was African-American, with "chubby cheeks" and skin that was "maybe a shade darker" than Howell's own "caramel" colored

skin. Howell also described the gun to detectives: a dark-colored, single-barrel shotgun with a pistol grip.

After Howell spoke with the detectives at the police station, they accompanied him back to his apartment. Howell directed them to Melvin's belongings. He testified that they "gathered some computers, her laptop, her desktop, some mail." They also took the paperwork related to Melvin's legal claim against Eze, even though Howell did not directly point it out to them.

Munguia also spoke to the police immediately after the shooting. He told the police that the shooter was an African-American man about 5'10" to 6'0" tall. Munguia told the police that the shooter had an "abnormally dark" skin tone and a "very thin" build. He also told them the shooter was wearing a charcoal gray or black hoodie. He described the gun as a long shotgun that was black with a brown or amber forehandle.

LAPD detective John Skaggs testified that he was dispatched to Sunset and McCadden on the night of July 5, 2015. He found an expended shotgun shell casing on the ground. The casing was white and said "Rio Royal" on it. Skaggs testified that it was "double aught buck" shot. In his 30 years as a police officer, including 23 as a homicide detective, Skaggs had never seen Rio Royal-brand ammunition before. He subsequently attempted to locate Rio Royal double aught buckshot for sale and was unsuccessful, even when he looked outside California.

LAPD detective Scott Masterson testified that he arrived at Sunset and McCadden between 11:30 p.m. on July 5, 2015 and midnight on July 6, 2015. He noticed that the lighting was "pretty good" due to streetlights and lights from nearby businesses. He observed Melvin lying on the ground. Her purse was with her and contained $233 in cash. Masterson also saw a spent Rio Royal shell at the scene; he had never seen that type of shell before. Masterson interviewed Howell later that morning,

and went to his apartment afterward. He recovered numerous items, including a one-page letter from the Labor Commission. Howell did not point out the letter to him. Masterson showed Howell the letter and all of the other items he seized before he left the apartment.

C. The Gun on the Beach

Sometime between 9:00 a.m. and 11:00 a.m. on the morning of July 6, 2015, the day after the shooting, Alex Hoerner took his niece and nephew to Sunset Beach. Hoerner's niece and nephew, who were six and nine at the time, ran down a hill of rocks toward the ocean. Within minutes, Hoerner heard his niece say, "Excuse me, what is this?" He went down to where the children were and found a shotgun next to a rock. Hoerner called 911. No one in their party touched the gun, which did not appear rusty.

While they were waiting for the police to arrive, Hoerner's nephew walked around the "rock face side of the beach" and found a shotgun casing. Hoerner testified that the casing, which was approximately two feet away from the shotgun, "didn't look like any shotgun casing I've ever seen."

LAPD officers Keith Sands and Michael Schaefer testified that they were dispatched to Will Rogers Beach at the end of Sunset Boulevard around 9:45 a.m. on July 6, 2015. Sands testified that they arrived at the beach around 10:00 a.m. and spoke to a man named Mr. Hoerner, who directed them to a Mossberg 12-gauge pump action shotgun with a pistol grip and shell lying in a rocky area. Schaefer testified that he recovered the gun and opened the action after several attempts. He testified that the gun was difficult to open due to "a lot" of sand and debris inside of it. Sands testified the gun "looked corroded, like it had some rust on it."

Corrosion engineer Sylvia Hall examined photographs of the gun taken when it was recovered from the beach and three

days later when it was received at the crime lab. She also examined the gun itself after it had been cleaned. She opined that the gun sustained "very minimal" corrosion consistent with being exposed to a marine environment for 12 hours or less.

Randy Wright, a former champion surfer, testified that he lived in his truck at Sunset Beach, where Sunset Boulevard meets the Pacific Coast Highway. On the morning of July 6, 2015, he was photographing surfers at the beach. He testified that surfing conditions were excellent, because "[i]t was negative low tide that morning." As he was watching the surfers, he saw a young boy and girl "goofing off in the rocks." About 20 or 30 minutes later, he saw some police officers in the rocks holding a shotgun. Wright took six pictures of the officers holding the gun, two of which were admitted into evidence. Wright posted about what he had seen on the Los Angeles Times website and included one of his photos in the post.

Out of curiosity, Wright consulted the tide charts produced by the National Oceanic and Atmospheric Administration (NOAA). He saw that Sunset Beach had experienced a high tide shortly after midnight on July 6, 2015. By that morning, when the gun was found, however, the tide was at a "negative low," below sea level. Later that afternoon, when the tide was higher, Wright took some more photographs of the area where he had seen the officers holding the shotgun. The photographs, which were admitted into evidence, showed waves crashing onto the rocks and splashing water on them.

Wright testified that he had dropped a camera battery onto the tidal rocks in the past. The battery stayed there for two days before the tide got high enough to wash it away. On cross-examination, Wright opined that he would expect a shotgun to stay in the rocks if thrown there due to its weight. He further opined that a shotgun shell might or might not do the same; it

would depend on the weight of the shell, its buoyancy, and the power and angle of the ocean swells and current.

LAPD sergeant Jeff Spangler testified that he was a supervisor on the force's underwater dive unit. He used NOAA tide charts as part of his duties. He testified that surfers also use the charts. Spangler testified that the chart for July 5, 2015 showed that the tide was at its highest level of the day, 5.71 feet, at 11:42 p.m. The chart for July 6, 2015 showed that the tide was 2.87 feet at 10:00 a.m. Spangler testified that a low tide occurred between July 5th and 6th; the lowest tide of -0.05 feet occurred at 6:18 a.m. on July 6th.

D. The Investigation

Dr. Vadims Poukens, a deputy medical examiner, performed an autopsy on Melvin on July 7, 2015. He concluded that she died of a single shotgun wound to the head, which he opined was a homicide. He was able to determine that the approximately 4-inch by 2-inch wound near Melvin's left eye was caused by a shotgun because it was large and contained multiple pellets. Poukens did not recall how many pellets he recovered and testified that it was not his practice to recover every non-organic item from a wound. He noted that Melvin also sustained skull and jaw fractures, as well as small "satellite wounds" on her left cheek and lip. The prosecutor showed Poukens an enlarged photo of one of the satellite wounds, and he testified that a "triangular shape" in the wound was "consistent with plastic." Poukens did not attempt to recover any debris from the satellite wounds at the time of the autopsy, and "didn't actually see that" triangular shape in the wound before or during the autopsy. On cross-examination, he testified that he first concluded there could be plastic in the wound only one hour earlier, when he reviewed the photos before taking the stand.

LAPD detective George Bowens testified that he was assigned to "do some background" on an individual named Ezeoma Obioha. He located an address associated with that name, a store in a strip mall on West Pico Boulevard. Bowens went to the strip mall on the morning of July 6, 2015. In an effort to learn more about defendant, Bowens went to a neighboring business, a medical marijuana clinic, and asked the security guard to speak with him. The security guard identified himself as defendant. Bowens asked him if he knew Melvin, and he said he knew her "and that she was someone that he had pursued romantically, but he didn't go into any details." Defendant also volunteered that Melvin had worked for him, and that he had written her a $700 check for the work, but then cancelled the check and paid her $700 in cash instead. Defendant said he had not seen Melvin since May 2015.

On July 7, 2015, Detective Skaggs received a phone call from a local television news reporter. She told him that she had seen a posting on the Los Angeles Times website about a gun found on the beach. Skaggs read the post, which was made by a "Randy Surfs." He called the police station responsible for the beach and had the gun and the shell from the beach transferred to his division. Skaggs testified that the shell "was a live, in tact [*sic*] bullet and it was a Rio Royal double [a]ught buck white plastic bullet." Skaggs testified that it had the same headstamp as the casing found at the crime scene and appeared identical to the expended shell.

LAPD criminalist and firearms analyst Alan Perez testified that he examined the spent shell found at the crime scene. He concluded it was a Rio Royal 12-gauge shell that had held nine pellets of double aught buck shot. He compared it to the shell recovered from the beach and noted that the shells had the same manufacturer, caliber, gauge, markings, headstamp, and double

aught buck designation. Perez testified that in his nine years as a firearms analyst, this case was only his second involving Rio Royal double aught buck shot shells.

Perez also examined the 12-gauge Mossberg pump action shotgun recovered from the beach. When he received the gun on July 9, 2015, the gun was rusty and the action was frozen. Perez had a photographer take pictures of the rusted gun; those photos were admitted into evidence. He then requested and received permission from the detectives to disassemble the gun and clean the rust from it. After Perez cleaned the gun and removed some sand from it, the action worked and he was able to operate it. He was unable to conclusively determine whether the gun was used in the Melvin shooting; the shell found at the crime scene "could have or could not have been fired from the Mossberg."

Perez used the gun to fire Rio Royal shots into a cardboard target from varying distances. Based on these tests, he concluded that Melvin was shot at close range, from a distance of two to 10 feet away. His tests also showed that clear plastic fragments from the Rio Royal shells "sometimes" embedded in the cardboard. When he was shown the same close-up photo of one of Melvin's satellite wounds as Poukens, he testified that "it looks like there's something in it. But what is in the wound, I can't tell for sure."

Officer Sands searched for the gun's serial number in a database and determined that it had been purchased by defendant. It had never been reported stolen. Masterson testified that he also performed a "firearms trace" on the gun. The trace showed that defendant had purchased the gun legally in Georgia in 2007 and that the gun had never been reported stolen. Masterson also retrieved the paperwork defendant completed when he purchased the gun, which included the gun's serial number. On it, defendant listed his height as 6'3".

The police arrested defendant on July 24, 2015. That same day, Masterson prepared a six-pack photo lineup that included defendant's booking photograph in position number 3. Masterson acknowledged that the photo was underexposed but did not know how it got that way.

Masterson showed the six-pack photo lineup to Howell at a laundromat. Before showing Howell the lineup, Masterson read him a standard admonition, including an advisory that "photographs do not always depict the true complexion of a person. It may be lighter or darker than shown in the photo." About 10 to 15 seconds after Masterson showed Howell the six-pack, he saw Howell "physically begin to shake." Howell circled defendant's photo. Howell testified that his "heart rate went up" and he "kind of started to sort of quiver" when he saw defendant's photo. On the back of the six-pack, he wrote, "I remember number 3 walking behind us and shooting Carrie Melvin with a shotgun."

Munguia testified that he also reviewed a six-pack photo lineup a few weeks after the shooting. After receiving and signing the standard admonition, he circled the photos in position numbers 1 and 3. He wrote, "Number 1 has similar body habitus and size. Eyelashes, nose thickness, chin and hair length match the shooter. Number 3 has similar skin color and hairstyle length." On cross-examination, Munguia acknowledged that the photo of defendant was "a dark picture of him," such that he looked darker in the photo than in real life.

Jane Ngo, a supervising investigative auditor with the district attorney's office, reviewed bank records of both defendant and Melvin. Melvin's bank records showed that she deposited a cashier's check for $1620 from Hoodfellas on May 4, 2015, but that the funds were removed from her account as a "charge back" that posted on May 6, 2015. Defendant's bank records showed

that he was the signatory on an account for a business called Hoodfellas. His bank records showed a deposit for $1620, the chargeback, posted on May 4, 2015.

Griselda Castillo testified as a custodian of records for AT&T. She testified that AT&T received a court order for defendant's cell phone records dated May 10, 2015 to July 9, 2015. The records showed that defendant did not use any data on the evening of the murder, but used data during every other evening the records covered.

E. The Wage Dispute

Claudia Quintanilla, a deputy commissioner in the California Department of Industrial Relations, Division of Labor Standards, testified that her office helps employees recover unpaid wages, damages, and penalties from their employers. She was in charge of a claim filed by Carrie Melvin against "an employer known as Ezeoma Obioha/Hoodfellas." Quintanilla testified, without objection, that Melvin claimed $1740 in unpaid wages, or 87 hours at the rate of $20 per hour, from April 15, 2015 through May 1, 2015. Melvin further claimed liquidated damages of $783 and waiting time penalties of $120 per day. A cancelled cashier's check issued by Hoodfellas to Melvin for $1620 was attached to Melvin's claim. Quintanilla set the matter for a conference on July 27, 2015, and mailed a notice of the conference to defendant on June 29, 2015. Quintanilla sent a letter informing defendant that the case was closed after Melvin failed to appear at the July 27, 2015 hearing.

II. Defense Evidence

A. Family Members

Defendant's mother, Pauline Obioha (Pauline), testified that she lived with defendant in July 2015. He worked as a security guard and owned a store, Hoodfellas, that sold designer

clothing. Pauline invested in Hoodfellas and sometimes assisted defendant financially.

On July 5, 2015, defendant worked as a security guard from 10:00 a.m. to 8:30 p.m. He arrived home between 9:15 and 9:20 p.m. Pauline heard him put his children to bed around 10:00 p.m. Pauline went to bed around the same time. Defendant was home at the time, and Pauline never heard the security alarm indicate that the door to the house had been opened. Pauline also heard "movement" in defendant's room around 11:00 or 11:30 p.m. Defendant took his children to school the next morning, July 6, 2015, and signed them in at 10:00 a.m.

Pauline testified that she would never lie for defendant. She and other family members did attempt to assist him with his case. They sent letters to the District Attorney and met with assistant head deputy district attorney Craig Hum in 2016. At that meeting, they told Hum that defendant was not at the scene of the crime on July 5, 2015.

During cross-examination, the prosecutor played a recording of an October 15, 2015 phone call between Pauline and defendant. In that phone call, Pauline asked defendant, "Ok, now the people that you were with, why can't they come forward and say you were with them?" Defendant responded, "That's what the P.I. is working on now, and you saying stuff like that doesn't help my case. . . . You know, we know that there are statements even you and Nkechi can make, you know, on my behalf." Pauline testified that the conversation was about a child custody dispute and "has nothing to do with this case."

Defendant's sister, Nkechi Howell (Nkechi; no relation to Anyi-Malik Howell, testified that she and other family members had taken an active role in defendant's case. Nkechi talked to defendant daily while he was in jail, and worked up to three hours on his case every day, even though she was not an

attorney. Defendant repeatedly told her after his arrest that he had paid Melvin. She looked through his bedroom and found a receipt dated May 2, 2015 that showed a cash payment of $1740 to Melvin. Nkechi also found the receipt book from which the receipt had been removed; it was on defendant's dresser beneath paperwork and clothing. Some of the receipts in the book, including the May 2, 2015 one, were not in chronological order.

Nkechi knew defendant owned firearms but had never seen his shotgun, which she believed he kept at his store. Defendant told her at some point after his arrest that his gun had been stolen and that he had reported the theft. The prosecutor played recordings of phone calls between defendant and Nkechi during cross-examination. In one of the calls, defendant suggested that a photographer planted the gun in an attempt to "look like a hero." In another, he suggested that Melvin had keys to his business and that Howell used the keys to go to "one of the studios," steal the shotgun, and put it on the beach. In a third, he and Nkechi discussed "records" that showed "data again after that time," and "what circumstances could cause that."

B. Expert Witnesses

Jeffrey Boxer, a retired commercial photographer and firearms enthusiast, visited the crime scene and "reenacted" the shooting using his cane in place of a gun. Based on the lighting and positioning of the shooter and the witnesses, Boxer concluded that Howell and Munguia would have been unable to see features of the gun, including its grip. Boxer also opined that a shooter would not hold the gun in the manner Howell described. He concluded that it was "highly unlikely" that Melvin was shot with defendant's gun.

Boxer conducted several experiments in which he used a Mossberg 12-gauge pump action shotgun to fire Rio Royal shells at a target. Every time, the plastic on the shells shattered and

pierced the target "all around the penetration holes of the lead." He reviewed photos from Melvin's autopsy, including the enlarged photo that Poukens examined. He did not see any plastic shards in the satellite wounds. He did see some white material on Melvin's face, however. Because Rio Royal shells, unlike most shotgun shells, do not contain white "packing material" to contain the shot pellets, yet spray plastic shards, Boxer concluded that Melvin was not shot with a Rio Royal shell.

Mitchell Eisen, Ph.D., testified that he is the director of the graduate program in forensic psychology at California State University—Los Angeles. He studies the memory and suggestibility of eyewitnesses. He testified generally about the effects of trauma, weapon focus, suggestibility, and the passage of time upon memory. He also testified about best practices for assembling and using six-pack photo lineups, including the importance of ensuring that every photo in the array is a "viable choice" based on the witness's description. He opined that it was "possible" for a photograph to "stick out" from an array if the person it depicts has the darkest skin among the six.

C. Law Enforcement Witnesses

Defendant recalled certain prosecution witnesses. Detective Masterson testified that he seized five cell phones and four iPads from defendant's home and business. He further testified that the LAPD was "never able to get into them" even though the devices were sent to the FBI for analysis. When Masterson searched defendant's business, he found a digital recording from a security camera there. He attempted to view footage from July 5 and July 6, 2015 but discovered that the recordings only went back to July 15, 2015.

Auditor Ngo testified that defendant withdrew $1360 in cash from a Hoodfellas bank account in May 2015. She did not know what defendant did with the money; it was not redeposited

in any of the other bank accounts she reviewed. On cross-examination, she testified that the total balance of defendant's 12 bank accounts on July 5, 2015 was negative $1,468.23.

Defense counsel also played for the jury a full recording of Howell's interview with detectives the morning after the shooting. During that interview, Howell said he "couldn't really see over the gun" before he described the shooter.

III. Rebuttal Evidence

Bernard Melvin, Melvin's father, testified that the signature on the receipt Nkechi found in defendant's bedroom was not Melvin's signature. He further testified that he did not find a copy of the receipt in his daughter's belongings. Forensic document examiner Miriam Angel testified that she examined the receipt and compared the signature to known exemplars of Melvin's signature. She was unable to determine whether the signature on the receipt was Melvin's.

Assistant head deputy district attorney Craig Hum testified that he met with defendant's mother, sister, and brother on August 5, 2016. Hum testified that Nkechi provided the bulk of the information during the meeting, and that none of it was new to him. At that meeting, defendant's mother did not tell Hum that defendant was at home with her on the night of the murder. He further testified that he first heard that defendant would be presenting an alibi defense about a month before trial.

IV. Surrebuttal Evidence

Defense counsel read a portion of Howell's preliminary hearing testimony into the record. In that testimony, Howell stated that he told detectives that he looked up defendant online after reading a newspaper report about his arrest. He did not investigate defendant prior to that point.

DISCUSSION

I. Photo Lineup

Defendant argues that the six-pack photo lineup shown to witnesses Howell and Munguia was impermissibly suggestive and violated his due process rights by tainting the witnesses' subsequent in-court identifications. We disagree. Moreover, even if the lineup was impermissibly suggestive, the witnesses' identifications were reliable under the circumstances.

A. Background

Prior to trial, defendant filed a motion to exclude "all evidence related to a photo six-pack line-up involving witnesses Anyimalik [*sic*] Howell and Eric Munguia," from which Howell selected defendant's photo (number three) and Munguia selected the photos of defendant and another individual (number one and number three). Defendant argued that the photo used in the six-pack—a copy of his booking photo—"appears MUCH darker than the defendant actually is and appears to have been manipulated." Defendant contended the photo thus impermissibly aligned with Munguia's description of the shooter as "abnormally dark" and caused defendant's photo to stand out from the others.

The prosecutor opposed the motion. At the hearing, the trial court examined defendant's booking photo, the six-pack lineup, and defendant's driver's license photo. The court agreed with defense counsel that defendant's face appeared lighter in the booking photo than in the six-pack, though it noted that the "background in the booking photo is actually darker than the background in the photo spread." The court further found that the photo in the six-pack was "a dark photo." The court observed that Munguia did not appear to be "overly persuaded" by defendant's photo, since he selected two photos. The court denied the motion, remarking, "This is why we have juries."

The prosecutor introduced the six-pack and the witnesses' prior identifications at trial. Both Howell and Munguia identified defendant as the shooter in court. Detective Masterson, who prepared the six-pack, explained that he did not use defendant's driver's license photo, which more accurately depicted his complexion, because defendant was smiling in that photo. Masterson also denied manipulating the photo that was used.

B. Legal Standard

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989; see also *People v. Thomas* (2012) 54 Cal.4th 908, 930.) With respect to the first issue, the question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select the defendant. (*People v. Cunningham, supra*, 25 Cal.4th at pp. 989-990.) With respect to the second issue, "there must be a 'substantial likelihood of irreparable misidentification' under the ""totality of the circumstances"" to warrant reversal of a conviction on this ground." (*Id.* at p. 990.)

"A claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we

apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard." (*People v. Clark* (2016) 63 Cal.4th 522, 556-557.) "The defendant bears the burden of demonstrating the existence of an unreliable identification procedure." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 989.)

C. Analysis

We have reviewed the photographic lineup in this case and do not find it unduly suggestive. All six photos depict African-American males who generally resemble one another. The men appear to be the same general age, have similar face shapes and hairstyles, and have similar, unsmiling facial expressions. Almost all of the men, including defendant, have some facial splotching that appears to be due to the printing process. It is true there are some differences among the photos. The men's eyebrows and ears are different shapes, their hair is different lengths, they are wearing shirts of different styles and colors, and one of them has his lips slightly parted. "'Because human beings do not look exactly alike, differences are inevitable.'" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943.)

Differences in photographs taken at different times, in different locations, and under different conditions are inevitable as well. The backgrounds behind the men range from light gray to bright blue. The lighting is harsher in some photographs than in others. The photograph in position number five is more close-up than the others, making the man's head appear larger than the others'. Although defendant's photo is underexposed, such that his skin appears darker than its true shade, nothing in the record supports defendant's repeated assertions that LAPD officers "manipulated" defendant's photograph, or his counsel's assertion at oral argument that the photo does not look human.

"The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him." (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 943; see also *People v. Cunningham*, *supra*, 25 Cal.4th at pp. 989-990.) The answer to that question is no. Indeed, Howell, who described the shooter's skin not as dark but as slightly darker than his own, identified defendant within seconds after experiencing a physical reaction that was noticeable to Detective Masterson. Howell said nothing about the skin tone in his note explaining why he selected defendant. Munguia, who initially described the shooter as "abnormally dark," acknowledged that skin tone was one of the factors in his selection of defendant's photo. However, he did not select defendant's photo unconditionally; he selected both photos number one and number three, and wrote that the person in photo number one had "similar body habitus and size. Eyelashes, nose thickness, chin and hair length match the shooter." Munguia's selection of photo number one in addition to defendant's undermines defendant's assertion that defendant's photo stood out. (See *People v. Thomas*, *supra*, 54 Cal.4th at p. 933.)

Even if the photo lineup was impermissibly suggestive, we would conclude that the witnesses' identifications of defendant were nevertheless reliable under the totality of the circumstances. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 989.) Both Howell and Munguia testified that they had good opportunities to view defendant at the time of the murder. The area was well-lighted, even according to defendant's expert witness. Howell was mere feet away from defendant and looked him directly in the face. Munguia was nearby at the time of the shooting and had the opportunity to view defendant up close when he saw him in a car next to his shortly thereafter. Howell

paid close attention to defendant, as he was in fear for his and Melvin's lives. Munguia, a security guard, watched the entire event unfold while he approached and stopped at a stop sign. Both witnesses were fairly accurate in their descriptions of defendant, Howell more so than Munguia. Despite stating during his interview that he "couldn't really see over the gun," Howell told detectives he observed defendant's "chubby cheeks," accurately assessed defendant as being in his 30s, and gave a good description of defendant's skin tone, height, and weight. Munguia described the shooter as "abnormally dark," but provided essentially the same height and weight assessment as Howell and other witnesses. Howell was so certain of his identification that he began to shake when he saw defendant's photo, and both he and Munguia unequivocally identified defendant in court, when his true skin tone was apparent, even when a man who appeared similar to photo number one was present.[3] Both men identified defendant at the first opportunity, less than three weeks after the shooting; Howell definitively said he was the shooter, while Munguia said the shooter was either defendant or the person in photo number one. Howell also testified that he did not do any research on defendant before that time. Under this constellation of circumstances, there is no substantial likelihood of irreparable misidentification sufficient to warrant reversal of the conviction. (*Id.* at p. 990.)

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[3]As we discuss more fully in section II, *post*, defendant sought to present a defense of third party culpability. The individual he hoped to implicate, Christen Wise, apparently bore a strong resemblance to the man depicted in photo number 1 in the lineup. Defendant subpoenaed Wise to court during the preliminary hearing, at which point he asked Howell, Munguia, and another witness who did not testify at trial whether they recognized him. All three of them said no.

II. Third Party Culpability

Defendant contends that the trial court erred when it granted the prosecutor's pretrial motion to exclude evidence of third party culpability. He further contends that the exclusion of this evidence violated his due process rights by depriving him of a defense, and "hampered" his right to cross-examine Munguia. The court's ruling was not erroneous.

A. Background

Prior to trial, the prosecutor filed a motion to exclude anticipated evidence of third party culpability. The motion stated that "[t]he defense has provided numerous hearsay statements to the People, suggesting that Melvin's ex-boyfriend, Chaka Hayes, and two gang members named Christen Wise and TeSean Lincoln were responsible for Melvin's murder and that the murder was carried out to prevent Melvin from reporting illegal activities she had witnessed. The defense reports have also suggested that Howell was involved in the murder, alleging that he stepped away from Melvin just before she was shot as proof that he knew the shooting was going to occur. The defense subpoenaed Christen Wise to court for the preliminary hearing in this matter and the percipient witnesses were asked to look at Wise. None of the percipient witnesses recognized Wise or identified him as either the shooter or involved in any way."

At the hearing on the motion the day before trial, defense counsel conceded they were "still working on" whether to pursue a third party culpability defense. They asserted that Wise worked at Hoodfellas with defendant and Melvin, had access to defendant's shotgun, and "admit[ted] to being at the beach P.C.H. [*sic*] in Santa Monica on July fourth," such that he would have

had opportunity to plant the gun.[4] They further asserted that Wise initially "act[ed] as if he does not know" Melvin during his interview with the LAPD, but later "says yeah I think I know who you are referring to," in what they suggested was a "feigned" attempt to direct suspicion away from himself. Defense counsel also stated that they had a Google Earth photo showing a red pickup truck parked outside Wise's home, and that Munguia, the security guard, told them Melvin had a red pickup truck.[5] The

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[4]In connection with its opposition to the motion for new trial, the prosecution provided the court with the police report summarizing the interview with Wise. According to that summary, "Christen Wise met Ezeoma Obioha in December 2015 [*sic*] through a mutual friend. Christen Wise only knew the mutual friend by the moniker of 'Wicked.' . . . Christen Wise, [Wicked], and Ezeoma Obioha worked together on various music production projects. [¶] Christen Wise and Ezeoma Obioha eventually parted ways on, or around, May 19, 2015. Christen Wise said he was banned from the business because of a small dispute that nearly ended in a fist-fight. During the time that he was at the store he never saw a rifle or shotgun. He had access to all parts of the store except a small office that Ezeoma Obioha used. [¶] On July 4, 2015 [the day before the murder], Christen Wise went to Santa Monica with three friends. . . . Christen Wise denied murdering Carrie Melvin as well as being involved in her murder."

[5]Defense counsel did not proffer at the hearing (but argues on appeal) that defense investigators prepared and showed to Munguia a six-pack photo lineup that included a photo of Wise (but evidently not defendant) before trial. In connection with the motion for new trial, new defense counsel submitted a declaration from one of the investigators, which stated that Munguia selected Wise from the lineup, said he "has the same complexion and eyes as the shooter," and also said "this is the guy" when looking at a separate photo of Wise on the same occasion.

prosecutor reiterated that both Howell and Munguia said Wise was not the shooter at the preliminary hearing.

The trial court granted the motion to exclude evidence of third party culpability, stating that, "without more," defendant's proffer was "not enough to get over the bar to third party culpability evidence." The court therefore sustained "the objection to the third party culpability evidence such as it is."

B. Legal Standard

"[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt[ ] must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) "[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*).) "[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352)." (*Hall*, *supra*, 41 Cal.3d at p. 834.)

We review a trial court's evidentiary rulings, including those made with respect to third party culpability evidence, for abuse of discretion. (*People v. Elliott* (2012) 53 Cal.4th 535, 581; *People v. Prince* (2007) 40 Cal.4th 1179, 1242.)

C. Analysis

As the trial court found, the evidence concerning Wise proffered by defense counsel did not directly or circumstantially connect him to the actual commission of the crime. At best, the evidence demonstrated that Wise may have had an opportunity to commit the crime. That was not sufficient to raise a reasonable doubt as to defendant's guilt. (*Hall*, *supra*, 41 Cal.3d at p. 833.) The trial court accordingly did not abuse its discretion in excluding the evidence.

"We . . . reject defendant's various claims that the trial court's exclusion of the proffered evidence violated his federal constitutional rights to present a defense [and] to confront and cross-examine witnesses." (*People v. Robinson* (2005) 37 Cal.4th 592, 626.) "There was no error under state law, and we have long observed that, '[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [state or federal constitutional] right to present a defense.' (*Hall*, *supra*, 41 Cal.3d at p. 834 [Citation].)" (*Robinson*, supra, 37 Cal.4th at pp. 626-627.) Defendant has not demonstrated that this case should not be subject to this general rule. He had and took advantage of ample opportunity to cross-examine Munguia about a variety of inconsistencies in his identification and testimony generally. The inability to ask Munguia about a red truck collateral to the issues did not undermine his right to cross-examination.

III. Disclosure of Expert Opinions

Defendant argues that the prosecution "ambushed" him at trial by introducing expert testimony it had not previously disclosed, namely medical examiner Poukens' opinion that a "triangular shape" he observed in an enlarged photo of a wound on Melvin's face was "consistent with plastic." Defendant contends that Poukens's testimony undermined a promise his

counsel made to the jury during opening statement, that "you're not going to hear any testimony from them about plastic in the face," violated the prosecution's discovery obligations, and "materially undermined [defendant's] right to a fair trial." The Attorney General responds that defendant forfeited the issue by failing to object at trial, and that his arguments fail on the merits. We conclude defendant's substantial rights were not violated.

A. Background

One of defendant's theories, supported by testimony from his expert witness Boxer, was that Melvin was not shot with his gun or with Rio Royal ammunition. According to Boxer's experiments, Rio Royal ammunition always sprayed plastic shards when fired, and there were no plastic shards in Melvin's wounds; ergo, she was not shot by Rio Royal ammunition. Boxer testified to that effect at the preliminary hearing.

At a hearing the day before trial, however, defense counsel acknowledged that "we don't know if [a satellite wound on Melvin's face] was from a plastic fragment or not. [¶] *That is undetermined*." He further told the court at that time, "I have yet to see or hear about any results conclusions opinions [*sic*] regarding whether there were any such plastic fragments found in the skull of the victim." Despite this uncertainty on the eve of trial, defense counsel unequivocally told the jury during opening statement, "[y]ou're not going to hear any testimony from them about plastic in the face."

A few days into trial, the prosecution called Poukens to testify. According to defendant's brief, the prosecution told defense counsel that morning that Poukens and firearms analyst Perez had reexamined an enlarged version of photograph of a satellite wound that had been disclosed to the defense much earlier, and "reversed their opinions concerning whether plastic

was located in one of Ms. Melvin's satellite wounds." Defendant does not provide a record citation to support this assertion, and we were unable to find such an exchange reflected in the record. In any event, the prosecution called Poukens and showed him the enlarged photograph. The prosecutor asked him whether "that object that looks like it's in the wound there, would that be consistent with, for example, a small clear piece of plastic?" After clarifying that the prosecutor was "talking about this triangular shape," Poukens testified "[y]es, it is consistent with plastic." Perkins further stated that he did not recover any debris from the wound in question during the autopsy, and "didn't actually see that before the autopsy or during the autopsy." Defense counsel did not object to the testimony or the enlarged photograph.

On cross-examination, Poukens confirmed that he "did not see the plastic" during his autopsy or when reviewing standard photos of the wounds. He saw "this photograph with enlargement before my testimony today," "[a]pproximately one hour ago," and it appeared to him from that photo "this is piece [*sic*] of plastic in the wound." Poukens further testified that he did not recover plastic from Melvin's wounds, and that he "can't tell with definite" certainty whether there was plastic in them. When asked whether it was his "opinion to a reasonable degree of medical probability that that's a piece of plastic," Poukens said he did not know. On redirect, Poukens confirmed that the "presence of some object in the satellite wound" did not change his opinion about the cause of Melvin's death.

The prosecutor asked Perez about the enlarged photograph over defense objection. He testified, "it looks like it's penetrating impact of some type and it looks like there's something in it. But what is in the wound, I can't tell for sure." On cross-examination,

Perez agreed that the object "could be a metal fragment [from] one of the pellets."

Defense expert Boxer conceded on cross-examination that he had reviewed a copy of the original (not enlarged) wound photograph at issue. When the prosecutor used the computer to zoom in on the photo, Boxer said, "[i]t looks like there's something in there." He acknowledged that it "[c]ould be" a piece of plastic. Boxer further testified that he remembered enlarging the photo and seeing the object while reviewing the case file, but had ruled out the object as being plastic from a Rio Royal shell because it was too thin. Defense exhibit O was a photo of a satellite wound "shown at 400% enlargement."

Defendant did not request, and the court did not deliver, a jury instruction on untimely disclosure of evidence.

B. Legal Standard

Penal Code section 1054.1, subdivision (f) obliges the prosecution to disclose to the defense "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial," "if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies." Penal Code section 1054.7 compels immediate disclosure "[i]f the material and information becomes known to, or comes into the possession of, a party within 30 days of trial." Discovery thus "is an ongoing responsibility, which extends throughout the duration of the trial and even after conviction." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1383.) "The rationale behind California's discovery statute is that

neither side should be allowed to engage in, or be subjected to, a trial by ambush." (*People v. Bell* (2004) 118 Cal.App.4th 249, 256.)

C. Analysis

Notwithstanding the Attorney General's reasonably persuasive argument that defendant forfeited this issue on appeal, we review the merits of defendant's claims pursuant to Penal Code section 1259 in light of his contention that his substantial rights were affected. We find no error.

There is no dispute that defense counsel timely received Poukens's autopsy report and the original photo that the prosecutor enlarged. Indeed, defendant's expert testified that he enlarged the photo himself while preparing his opinions and, like Poukens and Perez, *saw something that "could be" plastic*. Moreover, the record reflects a continuing uncertainty by both sides as to the nature of Melvin's wounds and the character of any debris therein, despite defense counsel's pronouncement during opening statement. The testimony the prosecutor elicited from Poukens and Perez reflects the uncertainty; neither witness stated that the wound contained plastic, only that it appeared consistent with that possibility.

Defendant further represents that the prosecutor advised him of Poukens's anticipated testimony about the enlarged photo after she showed him the photo and before he took the stand. Nothing in the record suggests that the prosecutor possessed this information at an earlier point or failed to notify defendant as soon as Poukens updated his opinion, in accordance with her obligations under Penal Code sections 1054.1 and 1054.7. "[D]uring the trial process, things change and the best laid strategies and expectations may quickly become inappropriate: witnesses who have been interviewed vacillate or change their statements; events that did not loom large prospectively may

become a focal point in reality. Thus, there must be some flexibility." (*People v. Hammond* (1994) 22 Cal.App.4th 1611, 1624.)

Defendant did not object or otherwise inform the court about what he now contends was an untimely disclosure. Instead, his counsel vigorously cross-examined Poukens and highlighted both the uncertain nature of Poukens's testimony and Boxer's earlier assessment of the same enlarged photo during closing argument. Defense counsel also emphasized, without objection, what he perceived to be the eleventh-hour nature of Poukens's opinion, and suggested that it undermined Poukens's credibility. The record accordingly does not reflect that defendant lacked an opportunity to respond to the evidence, and he has not cited any controlling authority in support of his contention that his substantial rights were violated. The jury heard both sides of this issue and had the opportunity to examine both the prosecution's and the defense's enlarged photos. Defendant's right to a fair trial was not violated.

IV. Admission of the Shotgun and Related Records

Defendant argues that the trial court improperly admitted his shotgun into evidence because the prosecution failed to conclusively link the gun to the murder. He further contends that the "ATF Firearms Trace Summary used to link the shotgun to appellant was hearsay and was improperly admitted in violation of [his] right to confrontation." The Attorney General argues that the gun and paperwork were properly admitted, and that defendant forfeited any objection to the admission of the paperwork. We find that the gun was properly admitted and defendant has not preserved his claim about the paperwork.[6]

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[6]Defendant states in a footnote, without any citation or legal argument, that "[a]ny failure to object amounted to

Even if he had, the admission of exhibit 61, the only paperwork to which he objects now, did not prejudice him.

A. The Gun

i. Background

Prior to trial, defendant filed a motion to exclude the shotgun recovered from the beach. He argued that admission of the gun was unduly prejudicial because Perez's ballistics tests failed to link the gun to the murder and the gun did not match Munguia's description of the murder weapon. Defendant also asserted that Boxer concluded a Rio Royal shell could not have been used in the murder, such that the "one logical explanation for the expended RIO shell found at the crime scene and the unexpended RIO shell found on the rocks in the surf at the beach" was "that both were planted along with the recovered shotgun." The prosecutor opposed the motion.

At the hearing on the motion, the trial court asked defense counsel "[h]ow do you get around the fact that it is in the surf within hours of the shooting?" "[T]he timing is such that somebody had to figure out a way to get the man's shotgun, do the shooting, throw it in the surf or I guess plant it at low tide . . . ." The court further remarked that defendant's arguments against admitting the gun "go to weight" rather than admissibility, and that it would be "pretty dramatic for a judge to say okay, shotgun found within hours or certainly the next morning from the shooting can't be used for the reasons . . . suggested. [¶] I think you have got to let the jury hash it out." It denied the motion.

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ineffective assistance." This single sentence is insufficient to constitute a cognizable claim of ineffective assistance of counsel, particularly where defendant makes a fully developed claim of ineffective assistance of counsel (see *post*) and omits from it this alleged error.

ii. Legal Standard

Evidence is relevant when it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court has the discretion to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352, subd. (b).) "A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion." (*People v. Lewis* (2001) 26 Cal.4th 334, 374.)

iii. Analysis

Defendant renews his argument that admission of the gun was unduly prejudicial and speculative because the LAPD was unable to link it to the murder. Like the trial court, we reject this argument. As the trial court observed at the hearing, a gun found in the surf the day after a brutal murder, alongside ammunition similar to that found expended at the murder scene on the same street, is highly relevant. Although ballistics tests could not conclusively link the gun to the murder, they also could not conclusively rule out the gun as the murder weapon. While the probative value of the gun may have been weakened due to the lack of a conclusive link to the murder, it still outweighed the risk of prejudice to defendant, who could and did argue that the weapon was not used in the shooting. Moreover, as we discuss immediately below, the registration paperwork for the gun linked it to defendant, who in turned was linked to the murder scene by eyewitness testimony. The trial court did not abuse its discretion in determining that evidence of the gun was admissible, and the proper weight to give that evidence was a question for the jury.

B. The Paperwork

i. Background

Officer Sands, one of the police officers who recovered the gun from the beach, testified that he "ran" the number of the serial gun and discovered that it had not been reported stolen. The prosecutor reviewed three exhibits with Sands, numbers 60, 61, and 62, all of which were paperwork relating to the gun. Sands agreed that exhibit 60, a "three-page document from the State of California, Department of Justice" contained "information regarding the gun similar to that [he] obtained in the query [he] ran." He testified that the third page of exhibit 61, "certified records from the [federal] Department of Justice, Bureau of Alcohol, Tobacco and Firearms," listed information about the shotgun and identified defendant as the purchaser. Sands testified that the fourth page of exhibit 62, another certified record from the ATF, showed the serial number of the gun. Defendant did not object to any of this testimony.

The prosecutor later addressed exhibits 60, 61, and 62 with Detective Masterson, again without objection from the defense. Masterson testified that exhibit 60 was from the California Department of Justice and "says that this particular shotgun by serial number had never been reported stolen up to that date, . . . the date that the Los Angeles Police Department took custody of it." Masterson testified that exhibit 61 was "the reply that we get back from the A.T.F. " when we request a trace. Masterson further testified that exhibit 61 showed that defendant purchased the gun in Georgia in 2007. He agreed that exhibit 61 also showed "the entire history of that firearm from when it was shipped from a supplier to the location that it was sold," "all the way down to its final place of recovery which is shown at the bottom of Pacific Coast Highway." Masterson testified that exhibit 62 was a "firearm transfer record" that would have been

filled out by the purchaser of the gun. He reviewed the form and told the jury it had defendant's "name and information on it," along with the serial number of the gun recovered from the beach. All three exhibits were admitted into evidence without objection.

Defendant now contends that exhibit 61 was inadmissible hearsay and violated his confrontation clause rights because it was a testimonial statement that Masterson did not prepare. Defendant argues the exhibit was necessary to the prosecution's case because without it there was no link between him and the gun. He ignores Sands's discussion of exhibit 61 and makes no argument about exhibits 60 or 62.

ii. Legal Standard

To preserve a claim of evidentiary error for appeal, a defendant must make a timely objection on the ground(s) he or she wishes to argue on appeal. (Evid. Code, § 353, subd. (a).) A defendant who seeks to raise both hearsay and confrontation clause claims on appeal must object on both grounds in the trial court. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1216-1217.) We may not reach the merits of an unpreserved claim of improper admission of evidence. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) Even if his hearsay and confrontation claims were preserved and meritorious, they would be subject to harmless error review. We would reverse the erroneous admission of hearsay evidence only if it were "'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1308 (quoting *People v. Watson* (1956) 46 Cal.2d 818, 836).) A confrontation clause claim is subject to the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18. (*People v. Bryant* (2014) 60 Cal.4th 335, 395.)

iii. Analysis

Defendant did not preserve a hearsay or confrontation clause objection to exhibit 61. The record reflects that he did not object to the exhibit or testimony related thereto on *any* ground. He accordingly has forfeited his claims of error.

Even if he had not, and if his arguments were meritorious (a point we need not and do not decide), on this record that any error would be harmless under either standard. Defendant argues only that exhibit 61 was impermissibly admitted and violated his confrontation clause rights. The record shows, however, that exhibits 60 and 62 contained similar information that also linked defendant to the shotgun found on the beach. Thus, even if an objection to exhibit 61 had been made and sustained, the jury would have learned the same salient information from exhibits 60 and 62, the latter of which included a document prepared by defendant. Any error related to the admission of exhibit 61 would have been harmless.

V. Admission of Labor Commission Paperwork and Evidence of Romantic Advances

Defendant argues that the prosecutor violated his due process and confrontation rights by relying on "hearsay statements of Ms. Melvin," in the form of statements she made in Labor Commission paperwork and statements she made to Howell, "to prove both motive and the special circumstance allegation."

Defendant did not object to the admission of the Labor Commission paperwork and therefore forfeited his argument as to that evidence. Defendant objected on hearsay grounds to the admission of statements Melvin made to Howell. We conclude any error in admitting those statements was harmless, because defendant opened the door to them and they were duplicative of

other evidence of defendant's alleged romantic interest in Melvin, which was admitted without objection.

A. Labor Commission Paperwork

i. Background

Deputy Labor Commissioner Claudia Quintanilla testified that she handled a claim for unpaid wages that Melvin filed against defendant. Without objection, the prosecutor introduced and elicited testimony from Quintanilla about exhibit 25, a 10-page packet of certified records from the Division of Labor Standards Enforcement. This exhibit, the "Labor Commission paperwork," included a letter that the Commission sent to defendant after Melvin's death to inform him that the case was closed; notices of claim and conference outlining Melvin's claims and apprising Melvin and defendant of a conference that had been set to informally resolve them; a cashier's check for $1620; and an "F-1" form "that employees fill out when they have claim of wages" that Melvin had submitted to the Commission. Defendant did not object to the admission of exhibit 25 or Quintanilla's testimony about it, and did not request a limiting jury instruction.

ii. Legal Standard

As we previously have explained, a defendant must make a timely and specific objection to preserve a claim of evidentiary error for appeal. (Evid. Code, § 353, subd. (a).) A defendant who seeks to raise both hearsay and confrontation clause claims on appeal must object on both grounds in the trial court. (*People v. Rangel*, *supra*, 62 Cal.4th at pp. 1216-1217.) The erroneous admission of hearsay requires reversal only if it is "'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Seumanu*, *supra*, 61 Cal.4th at p. 1308 (quoting *People v. Watson*, *supra*, 46 Cal.2d at p. 836).) A confrontation clause claim is

subject to the harmless error standard of *Chapman v. California, supra*, 386 U.S. 18. (*People v. Bryant*, *supra*, 60 Cal.4th at p. 395.)

iii. Analysis

Defendant now contends that the Labor Commission paperwork violated his confrontation clause rights and contained multiple layers of hearsay not subject to the business records exception. Defendant forfeited these claims by failing to raise either argument below.

Moreover, although the Labor Commission paperwork arguably was the strongest evidence of Melvin's financial dispute with defendant, it was not the only evidence. Howell testified that Melvin was pursuing legal action against defendant due to "a check that he cancelled for services." Bank records showed the movement of $1620 from defendant's account to Melvin's and back again. Bowens also testified that defendant told him, unprompted, that he knew Melvin and had hired her to work for him. Defendant further told Bowens that he had issued Melvin a check for $700, but then, due to "some disagreement between them," paid her $700 in cash instead. In light of this evidence, the admission of the Labor Commission paperwork, even if erroneous, was harmless.

B. Evidence of Romantic Advances

i. Background

Defense counsel broached the topic of defendant's romantic interest in Melvin during Howell's cross-examination, asking him if it was true that he was concerned that defendant had a romantic interest in Melvin. Howell said that he was, and agreed that it upset him enough that he wrote a blog post about it. On redirect, the prosecutor asked Howell what Melvin had told him about the alleged romantic interest. The court overruled defendant's hearsay objection, and Howell explained that Melvin

said defendant had asked her out several times. Melvin further told Howell that defendant had invited her to what she believed was a meeting but which "ended up being at a really nice place." Defense counsel objected a second time, and the court sustained the objection. The court allowed Howell to testify that defendant made Melvin feel uncomfortable.

ii. Legal Standard

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay evidence is inadmissible unless it is subject to an exception. (Evid. Code, § 1200, subd. (b).) The erroneous admission of hearsay requires reversal only if it is "'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Seumanu*, *supra*, 61 Cal.4th at p. 1308 (quoting *People v. Watson*, *supra*, 46 Cal.2d at p. 836).)

"'"It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on that examination, he [or she] may be examined on redirect as to such new matter.'" [Citation.] "'The extent of the redirect examination of a witness is largely within the discretion of the trial court.'" [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 921.) In exercising that discretion, the trial court should aim to ensure fairness to both sides. (*Ibid.*)

iii. Analysis

The Attorney General acknowledges that Melvin's statements to Howell "may have been unexceptional hearsay." That characterization is apt: they were statements made outside court offered to prove the matter asserted, and the prosecutor did not argue for the application of any exception.

However, the record reflects that defense counsel was the first to raise defendant's romantic interest in Melvin, in Howell's cross-examination. The court properly exercised its discretion when it allowed the prosecutor limited latitude to explore that testimony. The court sustained defendant's hearsay objection when Howell began "getting into too much detail on this," thus ensuring fairness to both sides.

The record also contains other evidence of defendant's romantic interest in Melvin to which no objection was raised. Most notably, defendant introduced and played for the jury Howell's interview with the police, in which he relayed similar statements by Melvin. Bowens also testified that defendant told him that he had a romantic interest in Melvin. The evidence from Howell accordingly was not prejudicial.

VI. Admission of Telephone Calls to Nkechi

Defendant contends that his sister Nkechi was such "an instrumental part of [his] defense team" that the conversations she had with defendant while he was incarcerated were protected by attorney-client privilege. He argues that the court erred in allowing the prosecutor to question Nkechi about the contents of those conversations at trial and abused its discretion in denying his motion for new trial on this ground. We agree with the Attorney General that defendant's calls to Nkechi were not privileged. The court properly denied the motion for new trial.

A. Background

Nkechi testified on defendant's behalf. During cross-examination, the prosecutor sought to confront Nkechi with recorded phone calls involving her and defendant. Defense counsel requested a sidebar, at which he asserted that the prosecutor was "taking all of her preparation on the cross-examination of the defendant and is trying to get it in through this witness, his sister, which has absolutely nothing to do with

what she's testified to." The prosecutor disagreed and claimed that "[t]hese are statements made by the defendant to this witness and they're inconsistent." The court ruled, "It's an admission against the defense. It's what he told his sister. The sister is part of the defense team. She's actively engaged. He's coming up with different theories to defend himself. She's not an attorney. I think it's okay."

The prosecutor then played three phone calls between defendant and Nkechi. One of the recordings featured only defendant, and Nkechi testified that she did not remember that call, in which defendant theorized that a photographer planted the gun on the beach. She stated that she recognized her voice on the other two calls. One of those calls mentioned data, records, timing, and location, presumably in reference to the gap in defendant's cell phone usage on the night of the murder. The other concerned defendant's theory that Howell took Melvin's set of keys to defendant's business, used the keys to get the gun, and then planted the gun on the beach.

In his motion for new trial, defendant argued that the calls between himself and Nkechi were privileged and that their admission violated his Sixth Amendment rights. The trial court rejected these contentions.

B. Legal Standard

The attorney-client privilege, set forth in Evidence Code section 954, confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer. . . ." A "lawyer" is "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." (Evid. Code, § 950.) A "client" is "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service from him in his

professional capacity. . . ." (Evid. Code, § 951.) A "'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952.)

"The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) "Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Ibid.*; see also Evid. Code, § 917, subd. (a).)

The Sixth Amendment does not establish a federal attorney-client privilege. (*People v. Alexander* (2010) 49 Cal.4th 846, 887 (*Alexander*).) "Rather, the Sixth Amendment guarantees a criminal defendant the right to 'assistance of counsel for his defense.' (U.S. Const., 6th amend.) Confidential communication between a defendant and his lawyer is not a separate 'right' that the federal Constitution guarantees, but rather an aspect of ensuring fulfillment of the right to assistance of counsel." (*Alexander*, *supra*, 49 Cal.4th at pp. 887-888.) The

right to assistance of counsel is violated "either by (1) the complete denial of counsel or its equivalent, or (2) the denial of the effective assistance of counsel." (*Id.* at p. 888.) The interception of a conversation is not alone sufficient to establish a denial of the federal right to counsel. (*Ibid.*) "[A] court properly rejects a Sixth Amendment claim based on *surreptitious* state participation in communications between a defendant and his or her attorney or the attorney's agent when the record demonstrates there was no realistic possibility of injury to the defendant or benefit to the prosecution." (*Id.* at pp. 888-889, emphasis added.) We have located no authority, and defendant has pointed to none, indicating that a Sixth Amendment claim lies when the defendant and/or the lawyer is aware that the communication is being monitored.

We review the court's ruling on the motion for new trial under the deferential abuse of discretion standard. (*People v. Lightsey* (2012) 54 Cal.4th 668, 729.) We do not disturb such a ruling without the appearance of a manifest and unmistakable abuse of that discretion. (*Ibid.*)

C. Analysis

Defendant makes no attempt to establish that Nkechi, who testified at trial that she was not an attorney, is a "lawyer" as defined by Evidence Code section 950. Instead, he asserts, without citation to authority, that her membership on the "defense team" rendered her conversations with him privileged. Even if we assume this assertion is sufficient for defendant to make a prima facie showing that the call was privileged (see *Alexander*, *supra*, 49 Cal.4th at p. 886), the prosecution clearly carried its burden of showing that the conversations were not confidential. Nkechi testified that she knew "from day one that they record all of the phone calls and they listen to all of the jail visits and they will try and use them at any opportunity."

Defendant's mother also testified that "at the beginning" and "throughout the conversation" of "every jail call" there is an audible message that the call is being recorded. Defendant's conversations accordingly were not privileged under Evidence Code section 954.

Defendant's Sixth Amendment rights also were not impacted. Both he and Nkechi were aware, by virtue of the statement played during the calls, that the conversations were being recorded. Our analysis would be different if the monitoring were unknown to the defendant, as it was in *Alexander* and in the case defendant cites, *Weatherford v. Bursey* (1977) 429 U.S. 545.) In those cases, the defendant and lawyer or lawyer's agent believed their conversations were confidential. Defendant and Nkechi (and their mother, Pauline, who also testified that she assisted with the defense but is not characterized by defendant as a member of his "defense team") had no reasonable expectation that their calls were confidential, which may be why they spoke somewhat cryptically.

Because the trial court properly concluded that the privilege did not apply, it acted within its discretion in denying the motion for new trial.

VII. Exclusion of Alleged Evidence Destruction

Defendant argues that the trial court abused its discretion "in refusing to allow critical testimony about missing or destroyed evidence," namely evidence about LAPD detective Wes Lin's statement that he had reviewed surveillance video from defendant's business from July 5 and 6, which Detective Masterson testified did not exist. In defendant's view, "[t]his means that the recording of those crucial two days was deleted or destroyed, or that that Detective Lin was lying when he stated that he reviewed and viewed the video recorded on those two days." We find no error. The court appropriately applied

Evidence Code section 352. In addition, defendant relied on testimony that he was at home with his family at the time of the shooting, not at his store.

A. Background

Masterson testified on cross-examination that he executed a search warrant on defendant's business, and recovered security camera footage of the store. Masterson watched the video, which he said only went back to July 15, 2015. Masterson agreed with defense counsel that "it appeared" that the video was overwritten every nine or ten days.

Defendant recalled Masterson as a witness during his case-in-chief and revisited the issue of the surveillance video with him. Masterson again testified that there was no video for days prior to July 15, 2015. Defense counsel then presented Masterson with a "chrono log" that documented police activity in the case; the prosecutor objected on hearsay and speculation grounds in the middle of defense counsel's query as to whether Masterson could explain a contrary entry on the chrono log. The court sustained the objection and held a discussion at sidebar.

At sidebar, defense counsel explained that the chrono log said, "I, Detective Lin, conducted a follow up . . . where I inspected a digital video recorder that was seized pursuant to a search warrant at the defendant's business address on July 24. I reviewed the surveillance recording from July 5 and July 6. The business appeared closed during that time period viewed as there were no employees or customers that entered or exited the store." Defense counsel contended that Masterson's testimony suggested that such evidence had been destroyed, and expressed a desire to explore that. The court agreed to examine Lin outside the presence of the jury even though defense counsel had not subpoenaed him.

The following day, at an Evidence Code section 402 hearing, Lin testified that the video for July 5 and 6 was not available when he reviewed the surveillance footage and that he had "poorly worded" his entry on the chrono log. He explained that he believed the video, which appeared to him to be motion-activated, did not begin until a week or so after the murder. "So I think at the time I thought that it was that there was nothing moving, so nothing was activated on the 4th or 5th [*sic*]." Lin conceded on cross-examination by defense counsel that he was under investigation for *Brady*[7] violations involving destruction of evidence in an unrelated murder case.

The court ruled that Lin "answered the question to my satisfaction" and excluded further exploration of the matter under Evidence Code section 352.

B. Legal Standard

The trial court has the discretion to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352, subd. (b).) "A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion." (*People v. Lewis*, *supra*, 26 Cal.4th at p. 374.)

C. Analysis

Defendant contends that the "jury should have heard testimony about the missing video, which would have shown [defendant's] activity at [defendant's] business during those two crucial dates. Moreover, if video existed form [*sic*] those two dates, the jury could have inferred that video existed for the period between July 5 (the date of the crime) and July 15 (the

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[7]*Brady v. Maryland* (1963) 373 U.S. 83.

earliest recording date available by the time of trial), and possibly earlier. A reasonable juror could have concluded that Detective Lin destroyed the video because it contained exculpatory evidence."

It is unclear from defendant's brief how such video would have exculpated him; by the time he tried to raise the issue with the jury, defendant's mother Pauline already had testified that defendant was with her at home during the relevant time on July 5, 2015, and defendant took his children to school the following morning. If this alibi evidence was to be believed, defendant could not also have been at the store.

The trial court did not abuse its discretion in limiting questioning about the video. At best, the evidence was tangentially related to the case and would have required significant time to clarify for the jury. The court reasonably concluded that the limited probative value of the evidence was outweighed by its risk of undue consumption of time and confusion of the issues.

VIII. Ineffective Assistance of Counsel

Defendant argues that his trial counsel provided ineffective assistance because they failed to retain a corrosion expert, failed to call a defense investigator as a witness, failed to impeach Howell, and failed to object to Sergeant Moody's hearsay testimony about what Howell told him at the crime scene. He further argues that the trial court abused its discretion by denying his motion for new trial on this ground. We reject defendant's contentions.

A. Legal Standard

"The standard for showing ineffective assistance of counsel is well settled. 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing

professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 206-207.)

We review the court's ruling on the motion for new trial under the deferential abuse of discretion standard. (*People v. Lightsey*, *supra*, 54 Cal.4th at p. 729.) We do not disturb such a ruling without the appearance of a manifest and unmistakable abuse of that discretion. (*Ibid.*)

B. Analysis

i. Corrosion Expert

The prosecutor presented a corrosion expert, Sylvia Hall, who opined that corrosion on the gun found on the beach was consistent with the prosecution's theory that defendant committed the murder and disposed of the gun afterward. Defendant contends his counsel was ineffective in failing to retain its own corrosion expert to refute Hall's opinion.

The record does not reveal why defense counsel failed to call such an expert. We thus must reject his claim of ineffective assistance of counsel on this ground, unless there "simply could

be no satisfactory explanation." That is not the case here. The reveals that counsel was aware of possible experts in the area. During a pretrial hearing, the prosecutor informed the court that the corrosion expert she originally retained would be unavailable during trial. Defense counsel remarked, "And we live in a city where we have two major universities with metallurgy departments. I would think there would be several experts available." This comment suggests defense counsel had some familiarity with corrosion experts, which in turn suggests that they made a considered tactical decision not to enlist one. We presume this decision fell within the wide range of professional competence, particularly in light of counsel's decision to present alternative testimony that neither the gun nor the Rio Royal ammunition was used in the murder.

ii. Investigator White

Defense investigator Karin White interviewed murder witness Munguia prior to the preliminary hearing. She showed Munguia photos of Christen Wise, the man defendant sought to inculpate. According to White, Munguia identified Wise as the shooter three times during the interview. Munguia later testified at the preliminary hearing that he did not recognize Wise, who was present, and he positively identified defendant as the shooter there and at trial. Defendant argues that Munguia was the "only independent eyewitness," "his testimony was the most important in the trial in terms of the description of the shooter," and his counsel should have called White to impeach him.

The record suggests a compelling reason why defense counsel did not call White to ask her about Munguia's identification of Wise: the trial court (properly, see *ante*) excluded third party culpability evidence that Wise was the murderer. To the extent defendant suggests White would have highlighted other inconsistencies in Munguia's testimony, we

conclude trial counsel employed reasonable trial strategy in pursuing a vigorous cross-examination of Munguia rather than calling a collateral witness. Moreover, defendant has not demonstrated how he was prejudiced by the omission of this witness; counsel elicited numerous contradictions in Munguia's testimony.

iii. Impeachment of Howell

Defendant contends his trial counsel should have sought to undermine Howell's credibility by impeaching him with evidence that he threw a "loud party with a lot of women" at the apartment he had shared with Melvin shortly after her death. He further argues that trial counsel should have introduced evidence that Howell refused to speak with defense investigators and then "wrote on his Facebook page that Nigerians are creeping" and included cellphone and computer emojis in the posting.

The record does not show why trial counsel failed to elicit this evidence. However, their decision was well within counsel's professional discretion. The omitted evidence was far afield from the issues at trial and easily could have backfired on the defense by leading the jury to sympathize with Howell rather than question his veracity. Counsel did not perform deficiently in declining to impeach Howell with the suggested evidence.

iv. Moody Hearsay

Sergeant Moody testified that he responded to the crime scene and asked Howell if Melvin had any enemies. He further testified that Howell told him that Melvin may have been involved in a legal dispute with someone named Eze. Defendant contends that trial counsel rendered ineffective assistance by failing to object to this testimony on hearsay grounds, because "it conveyed to the jury that [defendant] was quickly identified as the suspect, and that he was the only possible suspect."

"[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (*People v. Maury* (2003) 30 Cal.4th 342, 419.) Trial counsel's silence during Moody's brief testimony is unexplained, and defendant fails to show that no conceivable reason exists for trial counsel's failure to object to evidence that the jury already had heard from Howell himself.

v. Motion for New Trial

The trial court did not abuse its broad discretion by denying defendant's motion for new trial on ineffective assistance grounds. Defendant failed to demonstrate that his counsel's performance was deficient or that it caused him prejudice.

IX. *Griffin* Error

Defendant contends the prosecutor committed reversible *Griffin* error by commenting on his refusal to provide law enforcement with the passcodes to various digital devices seized from his home and business. The Attorney General responds that this argument is forfeited. We agree. The argument also fails on its merits.

A. Background

During closing argument, the prosecutor called the jury's attention to the lack of cell phone data usage by defendant on the night of the murder. Defense counsel conceded that was "pretty good evidence" in his own closing, but argued that the police recovered numerous other devices on which defendant could have used data but failed to analyze them. In rebuttal, the prosecutor argued, "Phones. Where are the records from the other phones? The witnesses have testified, Detective Masterson testified, you cannot get this kind of call detail record unless you have the name of the subscriber and the phone number. And you cannot do a dump on a locked Apple device and the detective did not have the pass codes and they asked for the pass code. And the

defendant's own sister was allowed access to those phones as well and we still don't have those records." Defendant did not object.

B. Legal Standard

The Fifth Amendment of the United States Constitution provides a defendant with the right to remain silent, and prohibits a prosecutor from commenting on a defendant's exercise of that right. (*Griffin*, *supra*, 380 U.S. at pp. 614-615; see also *People v. Lewis* (2001) 25 Cal.4th 610, 670.) "Under the rule in *Griffin*, error is committed whenever the prosecutor or the court comments, either directly or indirectly, upon defendant's failure to testify in his defense. It is well established, however, that the rule prohibiting comment on defendant's silence does not extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Medina* (1995) 11 Cal.4th 694, 755.) Remarks are deemed to constitute *Griffin* error when it is "reasonably probable that the jury was misled into drawing an improper inference regarding defendant's silence." (*Id.* at p. 756.)

"A defendant cannot complain on appeal of error by a prosecutor unless he or she made an assignment of error on the same ground in a timely fashion in the trial court and requested the jury be admonished to disregard the impropriety. [Citations.] This procedural requirement has been applied repeatedly to cases involving claims of *Griffin* error." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1006 [citing *People v. Turner* (2004) 34 Cal.4th 406, 421; *People v. Medina*, *supra*, 11 Cal.4th at p. 756, and *People v. Mincey* (1992) 2 Cal.4th 408, 446].) "The only exception is for cases in which a timely objection would have been futile or ineffective to cure the harm." (*Mesa*, *supra*, 144 Cal.App.4th at p. 1007.)

C. Analysis

Defendant has not shown that a timely objection would have been futile or ineffective. To the contrary, the record reflects that the trial court was responsive to meritorious objections raised by defense counsel throughout the trial. Defendant does not argue that his counsel was ineffective in failing to make this objection. The argument accordingly is forfeited.

Even if it were not forfeited, the argument lacks merit. The prosecutor is permitted to comment on the state of the evidence or on the failure of the defense to call logical witnesses. The prosecutor's rebuttal remarks were responsive to the defense argument and explained why the jury had not heard about data usage on the other devices. The prosecutor did not say defendant was asked for the passcodes, only that the detectives asked. Nkechi's testimony and recorded phone calls suggested she had access to the other devices and had spoken to defendant about the passcodes. It is not reasonably probable that the jury was misled into drawing an improper inference regarding defendant's silence.

X. Speedy Trial

Defendant argues that the prosecution violated his speedy trial rights by "filing and dismissing successive cases against him."

A. Background

Defendant was arrested on July 24, 2015 and charged on July 28, 2015. He pled not guilty at his arraignment on July 28, 2015 and waived time for both his preliminary examination and trial. Defendant agreed to two additional continuances prior to the November 16, 2015 readiness hearing. At that hearing, defendant agreed again to continue the matter to January 8, 2016.

On December 15, 2015, defendant notified the prosecution and court that he wished to substitute his retained counsel. The court heard and granted defendant's request on December 17, 2015. All parties agreed that the January 8, 2016 hearing would become a readiness hearing. At that hearing, the parties again stipulated to continue the readiness hearing to February 23, 2016. All parties announced ready for preliminary hearing on February 23, 2016, and the court set the preliminary hearing for March 2, 2016.

The court held the preliminary hearing on March 2, 2016. Defendant was held to answer. The court set the matter for arraignment on March 16, 2016. On that date, defendant pled not guilty and waived statutory time. The court scheduled a pretrial hearing for April 27, 2016. On April 27, 2016, defendant stated "he will not waive any more time." The court determined that the last day for jury trial was June 27, 2016. It set the matter for pretrial hearing on May 26, 2016, and for trial on June 17, 2016.

On May 10, 2016, the court vacated the previously set dates of May 26, 2016 and June 17, 2016. The parties next appeared on June 6, 2016, at which point the prosecution advised that it would no longer seek the death penalty. The matter was transferred to another department, and defendant refused to waive time. The court set the next hearing for July 6, 2016.

On July 6, 2016, defendant waived time and the parties stipulated to continue the pretrial hearing to July 28, 2016. The court scheduled jury trial for September 13, 2016. On July 28, the court trailed the pretrial hearing to August 19, 2016.

On August 19, 2016, the prosecutor announced that he was being replaced by another prosecutor. Defendant did not waive time, and the court continued the hearing to September 2, 2016. The hearing was further continued to September 9, 2016,

apparently because another new prosecutor was assigned to take over the case. On September 9, 2016, the court set the matter for jury trial on September 12, 2016. Defendant moved for a continuance on September 12, 2016. The court granted the motion, scheduled a trial setting conference on September 16, 2016, and set trial on September 20, 2016.

Both parties announced that they were ready for trial on September 16, 2016. The court ordered them to appear as previously scheduled on September 20, 2016. On September 20, 2016, the prosecutor announced that she was "unable to proceed with the intent to refile today." The court granted defendant's motion to dismiss the case pursuant to Penal Code section 1382. The prosecutor immediately refiled the complaint.

The court called the matter for preliminary hearing on October 4, 2016. The preliminary hearing was held on October 4, 5, 6, and 7, 2016, and defendant was held to answer. The information was filed on October 21, 2016. Defendant pled not guilty and denied the allegations on October 22, 2016. Defendant did not waive statutory time, and the court set the matter for a pretrial conference on November 9, 2016. Trial began on November 29, 2016, just over a month after the information was filed.

B. Legal Standard

"California has enacted a series of statutes, commencing with Penal Code section 1381, which are a construction and implementation of the California Constitution's speedy trial guarantee." (*People v. Villanueva* (2011) 196 Cal.App.4th 411, 422.) Penal Code section 1382 requires the court to dismiss a felony case "when a defendant is not brought to trial within 60 days of the defendant's arraignment on an indictment or information," "unless good cause to the contrary is shown." (Pen. Code, § 1382, subd. (a)(2).) If a defendant waives the 60-day trial

requirement, the 60 days begins running if he or she properly withdraws the waiver in open court. (*Id.* § 1382, subd. (a)(2)(A).) "'No affirmative showing of prejudice is necessary to obtain a dismissal for violation of the state constitutional speedy trial right as construed and implemented by statute. [Citation.] Instead, "an unexcused delay beyond the time fixed in section 1382 of the Penal Code without defendant's consent entitles the defendant to a dismissal." [Citation.]' [Citation.]" (*People v. Villanueva*, *supra*, 196 Cal.App.4th at p. 422.)

Penal Code section 1387 "generally permits the prosecution to refile felony charges following dismissal only once." (*Jackson v. Superior Court* (2017) 4 Cal.5th 96, 103.) "This limitation, known as the 'two-dismissal rule,' was enacted in 1975 in order to prevent harassment of defendants by repeated dismissal and refiling of charges, to limit prosecutorial forum shopping, and to protect defendants' speedy trial rights." (*Ibid.*) "Although the right to a speedy trial is grounded in both the United States and California Constitutions [citations], the timely refiling of charges dismissed for denial of a speedy trial has been deemed constitutionally permissible absent a showing by the accused of actual prejudice." (*Crockett v. Superior Court* (1975) 14 Cal.3d 433, 437.) When a court has granted a motion for dismissal of the charges and the prosecution is permitted to refile charges under Penal Code section 1387, "the defendant is burdened with the obligation to demonstrate that he is prejudiced if he is to forestall the cause from proceeding to trial." (*Ibid.*) "If such accused cannot show that he has been prejudiced and the People are not barred by limitations applicable to the filing of an information . . ., the rule is that the statutory time period within which to bring a defendant to trial starts to run anew." (*Id.* at pp. 437-438.)

The Sixth Amendment to the federal constitution also guarantees the right to a speedy trial. (U.S. Const., 6th amend.)

"[The right to a speedy trial is 'fundamental' and is imposed by the Due Process Clause of the Fourteenth Amendment on the States." (*Barker v. Wingo* (1972) 407 U.S. 514, 515.) To determine whether a violation of the federal speedy trial right has occurred, the court must balance "four separate enquiries: whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for the delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." (*Doggett v. United States* (1992) 505 U.S. 647, 651.) "None of these four factors is 'either a necessary or a sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" (*People v. Williams* (2013) 58 Cal.4th 197, 233 (quoting *Barker v. Wingo*, *supra*, 407 U.S. at p. 522.).) The defendant bears the burden of demonstrating a violation of the speedy trial right. (*Ibid.*)

C. Analysis

The prosecution failed to bring defendant to trial on the initial information within 60 days of his withdrawal of his time waiver. The court accordingly granted defendant's motion to dismiss under Penal Code section 1382. The prosecution was entitled to, and did, refile a complaint against defendant on September 20, 2016. Defendant was held to answer on the complaint on October 7, 2016, and an information was filed on October 21, 2016. Defendant's trial began on November 29, 2016, well within 60 days of his arraignment. Even if it had not, defendant has not shown that he was prejudiced by any delay. Defendant's state speedy trial rights accordingly were not violated.

Defendant's federal speedy trial rights also were not violated. The first factor we consider is whether the delay before trial was "uncommonly long." Approximately 16 months elapsed between the date of defendant's arrest and the start of his trial. "[L]ower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year," depending on the charges at issue. (*Doggett v. United States*, *supra*, 505 U.S. at p. 652, fn. 1.) "[A]s the term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." (*Ibid.*) Sixteen months is not an uncommonly long delay in a special circumstances murder case. Even if it were, the other three factors collectively weigh against a speedy trial violation.

The second factor is which party is more to blame for the delay. Here, defendant acquiesced in numerous continuances before withdrawing his time waiver on April 27, 2016. Even after the withdrawal, defendant agreed to continuances. The prosecution arguably is only "to blame" for the two months between the refiling of the complaint and the start of defendant's trial. Defendant apparently asserted his right to a speedy trial in due course, satisfying the third factor. He was brought to trial approximately one month after the information was filed. The final consideration is whether defendant suffered prejudice as a result of the delay. As we noted above, defendant failed to make this showing. On balance, we cannot conclude that his federal speedy trial rights were violated.

XI. Cumulative Error

Defendant argues that the cumulative effect of "[t]he failure of trial counsel to provide effective assistance, the preclusion of a meaningful defense at trial, and the multitude of

other trial errors . . . rendered [his] conviction fundamentally unfair."

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.] Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Here, however, we either found no error with respect to any of defendant's claims, or found that any errors were harmless. Although we recognize a cumulation of harmless errors can result in an unfair trial, our review of the record here does not demonstrate any unfairness. (*People v. Valdez* (2004) 32 Cal.4th 73, 139.)

XII. *Pitchess* Review

Defendant requests that we review the sealed transcript of an in-camera *Pitchess* hearing concerning Detective Lin. The Attorney General does not object and accurately observes that "no such transcript is referenced in the record and the Court's August 16, 2017 notice to counsel indicates that it has no sealed transcripts." In reply, defendant simply notes that the Attorney General agrees with his request; he does not acknowledge or make argument regarding the missing transcript. We conclude that there is no reasonable probability that defendant would have received a more favorable result in this proceeding, even assuming an adequate record would have enabled us to conclude the trial court improperly failed to disclose material responsive to defendant's *Pitchess* motion.

A. Background

LAPD detective Wes Lin was the primary witness at defendant's March 2016 preliminary hearing. Shortly before the first trial in this matter was scheduled to begin, the prosecutor

learned that there might be disclosable information concerning Lin. Defendant filed a *Pitchess* motion seeking information about Lin on September 9, 2016.

On September 16, 2016, defendant filed a non-statutory motion to dismiss the case due to the issues with Lin. The trial court denied the motion after reviewing the transcript of the preliminary hearing.

A second preliminary hearing was held after the case was dismissed and refiled. The prosecutor did not call Lin as a witness at that hearing. The court presumably held a *Pitchess* hearing at some point between defendant's arraignment on October 22, 2016, and a hearing on November 17, 2016; in the latter hearing, both sides represented that the *Pitchess* motion had been resolved and defense counsel stated "Yes, that's been decided and we have that material." It appears the hearing may have occurred on November 9, 2016, a date for which the transcript is missing from the record.

Detective Lin did not testify at defendant's trial.

B. Legal Standard

"A complete and accurate appellate record is needed to effectuate the rights to meaningful appellate review. . . ." (*People v. Townsel* (2016) 63 Cal.4th 25, 68.) Such a record is particularly necessary for appellate review of *Pitchess* rulings (*ibid.*), to which we apply the abuse of discretion standard. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) "Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent." (*Id.* at p. 1229.) Where the record is inadequate to permit such review, the omission may be found harmless if the defendant fails to show a reasonable probability of a different outcome in the absence of the error.

(See *People v. Townsel*, *supra*, 25 Cal.4th at 70; *People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

C. Analysis

We conclude there is no reasonable probability that defendant would have received a more favorable result in this proceeding, even assuming an adequate record would have enabled us to conclude the trial court improperly failed to disclose additional material responsive to his *Pitchess* motion. *Pitchess* motions may be used to discover information to impeach an officer's credibility. (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 400.) That appears to have been the primary purpose of defendant's motion, which sought information about Lin's prior instances of untruthfulness and mishandling of evidence. However, Lin did not testify at defendant's preliminary hearing or his trial. Defendant thus had no opportunity to impeach him. An erroneous *Pitchess* ruling therefore could not possibly have affected defendant's ability to impeach Lin.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

DUNNING, J. *

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*Retired Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.